89-888

NO. _____

IN THE

Supreme Court of The United States

DECEMBER TERM, 1989

STATE OF NEW HAMPSHIRE,
Petitioner,

v.

ROBERT D. DEDRICK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

THE STATE OF NEW HAMPSHIRE
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QUESTION PRESENTED FOR REVIEW

I. Whether a suspect is in custody for *Miranda* purposes when the police have made no objective manifestations of restraint upon his freedom of movement.

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

The New Hampshire Attorney General, on behalf of the State of New Hampshire, petitions for a writ of certiorari to review the judgment of the New Hampshire Supreme Court in this case.

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court (App., *infra*, 1a-21a) is reported at 132 N.H. _____ and 564 A.2d 423. The opinions of the Hillsborough County Superior Court (App., *infra*, 22a-37a) are unreported.

JURISDICTION

The judgment of the New Hampshire Supreme Court was entered on October 6, 1989. (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Sometime after 3:00 a.m. on May 31, 1987, Manchester Police Sergeant James Stewart responded to 560 Chestnut Street in Manchester, New Hampshire to investigate a possible homicide. Once there, Sergeant Stewart discovered the body of Luis Rameriz lying on the floor in the kitchen of his first floor apartment. The body lay in a pool of blood caused by multiple stab wounds to the chest. Sergeant Stewart subsequently interviewed witnesses whose statements indicated that Robert David Dedrick may have been the last person to see Rameriz alive.

The police attempted to locate Dedrick. On June 1, 1987, Dedrick telephoned the Manchester police station and stated that he would come to police headquarters and speak to the police if they would provide transportation for him. Sergeant Stewart and Lieutenant William Bovaird picked up Dedrick and gave him a ride to the police station. Rameriz' murder was not discussed on the way to the police station.

Upon arriving at the police station, Dedrick was brought to the detective division. Sergeant Stewart sat with Dedrick in an interview room and took his personal history. After giving this background information, Dedrick asked to go to the bathroom. Sergeant Stewart told Dedrick to go ahead and pointed him down the hallway to the third door on the left. Dedrick left the detective division unaccompanied and went to the bathroom. (Transcript of Suppression Hearing, [hereinafter Tr.], pp. 20-21) There are three well-marked exit signs in the hallway outside the men's room. These three doors were unlocked. (Tr., pp. 22-23, Transcript of View, pp. 7-8). Dedrick returned from the bathroom by himself and entered the unlocked detective division. (Tr., pp. 19, 21-22, 123).

Sergeant Stewart, Lieutenant Bovaird, and Dedrick then sat down together in one of the interview rooms. Lieutenant

Bovaird told Dedrick that he was not under arrest. (Tr., pp. 24-25, 123). The officers explained that they wanted to speak to him about his activities on May 30, 1987, and Dedrick said that he had no problem in speaking with them. (Tr., pp. 25-26, 123). Dedrick gave the officers a description of events of May 30, 1987, that was inconsistent with information provided by other witnesses.

The officers left the interview room to discuss Dedrick's story. The officers reentered the interview room and Lieutenant Bovaird reiterated to Dedrick that he was not under arrest. (Tr., p. 127; Excerpt of Suppression Hearing [hereinafter "Tr. II"], pp. 58-59). He orally informed Dedrick of his rights, and Dedrick read them from a printed form. (Tr., pp. 30-32, 125-27). Dedrick stated that he understood his rights and agreed to answer questions without a lawyer. (Tr., pp. 31, 126). Neither officer considered Dedrick in custody at that point and each testified that he was free to leave. (Tr., pp. 29, 125).

The officers told Dedrick that Luis Ramirez was dead. Dedrick appeared surprised and shaken by the news. Sergeant Stewart and Lieutenant Bovaird then began pointing out to Dedrick discrepancies between what he had told them and what they had learned from other sources.

The officers told Dedrick that they thought there was a good possibility that he and Ramirez had argued over the money owed to Ramirez and that Dedrick had stabbed Ramirez in self-defense. After an initial denial, Dedrick admitted owing the money but denied any such confrontation with Ramirez, stating that he had made up with Ramirez on May 28. The officers also told Dedrick that they thought that bloody sneaker prints and fingerprints in Ramirez' apartment would match his sneakers and fingerprints. During this time both officers remained seated and neither one touched Dedrick. (Tr., pp. 35, 134). They did not threaten him or raise their voices. (Tr., p. 134, Tr. II, p. 80). The officers did not tell

Dedrick that if he killed Ramirez in self-defense it would go easier on him. (Tr., p. 164). During the interview, Dedrick drank from a bottle of soda he brought with him. (Tr., pp. 38, 136).

Dedrick stated that he didn't know what to do and that he wanted a lawyer. (Tr., pp. 37, 130). Lieutenant Bovaird immediately got up and left the interview room. (Tr., pp. 37, 42-43, 131). At the same time, Sergeant Stewart stood and gathered all of his papers from the table in preparation to leave. (Tr., pp. 37, 43, 131). As he did so, he said to Dedrick, "You want a lawyer, that's fine with us, but we'll never know that Luis came at you with a knife." (Tr., pp. 37, 41). Dedrick almost immediately responded, "That's how it happened." (Tr., pp. 37, 41, 43). Dedrick said that Ramirez had come after him with a knife and that he had defended himself by striking Ramirez and taking the knife away. (Tr., p. 41). He then leaned across the table and showed Sergeant Stewart a slight cut on his arm. (Tr., pp. 37, 41-42). Sergeant Stewart, suprised by Dedrick's response, did not say anything but sat back down and shut the interview room door. (Tr., pp. 43-44). Lieutenant Bovaird reentered the room, and Sergeant Stewart told him that Dedrick had just admitted to stabbing Ramirez. (Tr., pp. 44, 132). Lieutenant Bovaird had been out of the room for about a minute. (Tr., p. 132). At that point, the detectives would not have let Dedrick go, but they did nothing to communicate their intent to Dedrick. (Tr., pp. 167-68). About one hour had passed from the time that the officers picked up Dedrick to when he confessed. (Tr., pp. 47).

The officers asked Dedrick to go over what happened from the beginning. Dedrick gave a more detailed account as to how he killed Ramirez in self-defense and how, after the stabbing, he took cocaine and money from a shirt in Ramirez' closet. Dedrick also told the officers how he had wrapped the knife in his tee shirt and thrown it into a garbage can on Elm Street. The police officers asked Dedrick if he would show them

where he had disposed of the knife. At this point, Dedrick said that he meant nothing personal against the officers, that he realized this was their job, but that before he went any further he wanted to speak with a lawyer. Lieutenant Bovaird and Sergeant Stewart terminated the interview and Dedrick was placed in a holding cell and arrested for the murder of Luis Ramirez.

Manchester police then executed a search warrant for 622 Prescott Street, third floor, Dedrick's apartment. Among the items seized were a pair of sneakers and a white cap.

HOW THE FEDERAL QUESTION WAS PRESENTED

Dedrick filed a motion to suppress the statements he gave to the police on June 1, 1987. The trial court found that Dedrick was in custody and therefore entitled to *Miranda* protections when Lieutenant Bovaird reentered the interview room because "the intensity of the interview [had] escalated," and "such a change would have signaled a reasonable man in the same circumstances that the freedom officers had accorded him earlier was no longer available ...." (App., *infra*, p. 8a). Thus, the trial court suppressed all statements made by Dedrick subsequent to "[t]hat's how it happened," and also suppressed the results of the search conducted at Dedrick's apartment. (App., *infra*, p. 6a). The trial court later modified that order to expand Dedrick's statement "[t]hat's how it happened," to include "he stated that Mr. Ramirez had come at him with a knife, that he had punched the subject, took the knife away and stabbed him." (App., *infra*, p. 22a).

Following the trial court's order, the State filed three motions including: (1) Motion to Reconsider Suppression of Evidence Seized Under Search Warrant; (2) Motion for Further Findings of Fact and Rulings of Law on *Leon* Issue; and (3) Motion for Reconsideration of This Court's Order of October

21, 1987, Suppressing Certain Evidence. These motions were denied. (App., *infra*, pp. 22a-25a).

The State appealed the trial court's decision to the New Hampshire Supreme Court. On October 6, 1989, a divided New Hampshire Supreme Court, basing its decision exclusively on federal law, affirmed the trial court's decision. (App. *infra*, p. 6a). Two of the court's five justices joined in the lead opinion; the Chief Justice concurred specially. However, the Chief Justice expressed reservations about the lead opinion, stating that "[a]mbiguity apparent in decisions of the United States Supreme Court . . . leaves me less than certain that the standard we have found applicable in determining whether or not the defendant was in custody is the correct one." (App. *infra*, p. 11a).

Two justices dissented. In addressing the standard utilized by the majority in finding custody, the dissent stated, "[a]lthough I agree that custody must be determined by an objective reasonable standard . . . in order for the defendant's perception of custody to be reasonable, it must be based upon some objective manifestation of restraint upon the defendant's freedom . . . ." (App. *infra*, p. 17a).

REASONS FOR GRANTING THE WRIT

I. The New Hampshire Supreme Court's finding of custody for *Miranda* purposes when the police made no objective manifestations of restraint upon the suspect's freedom of movement conflicts with and misinterprets decisions of this Court.

A divided New Hampshire Supreme Court ruled in the instant case that a suspect was in custody and therefore entitled to the protections outlined in *Miranda v. Arizona*, 384 U.S. 436 (1966), despite: (1) a lack of any objective manifestations of

restraint on Dedrick's freedom of movement by the police; and (2) uncontradicted evidence, including Dedrick's own testimony, that the police did nothing to indicate to him that he was not free to leave. Rather, the Court found that Dedrick was in custody for the purposes of *Miranda* because "the intensity of the interview [had] escalated" and "such a change would have signaled a reasonable man in the same circumstances that the freedom officers had accorded him earlier was no longer available and that, as often as he made denials, they would renew their accusations until, in the end, he either confessed or asked, as Dedrick in fact did, to speak with an attorney." *State v. Dedrick*, 132 N.H. _____, _____, 564 A.2d 423, _____ (1989). Such a drastic expansion of "in custody" deserves this Court's attention.

The majority's finding that Dedrick was in custody for the purposes of *Miranda* directly conflicts with this Court's rulings in *California v. Beheler*, 463 U.S. 1121 (1983) (per curiam) and *Oregon v. Mathiason*, 429 U.S 492 (1977) (per curiam). Moreover, the state court's decision is based upon a misinterpretation of this Court's ruling in *Berkemer v. McCarty*, 468 U.S 420 (1984).

In *Mathiason*, the defendant, while still a suspect, was interviewed by a police officer in a closed room where he confessed to a burglary. 429 U.S. at 493. The Supreme Court of Oregon reversed the defendant's conviction, finding that the defendant had been subjected to custodial interrogation because he was questioned in a "coercive enviornment." *Id.*, *quoting*, *State v. Mathiason*, 275 Or. 1, 5, 549 P. 2d 673, 675 (1976), *rev'd Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam). This Court summarily reversed, holding that "there [was] no indication that the questioning took place in a context where [the defendant's] freedom to depart was restricted in any way." *Mathiason*, 429 U.S. at 495.

Similarly, in *Beheler*, the defendant, who the police suspected of murder, voluntarily went to the police station for questioning, was informed that he was not under arrest, and gave a statement to the police.463 U.S. at 1122. The California Court of Appeals reversed the defendant's conviction, finding that his statement was the product of custodial interrogation because "the interview took place in the station house ... the police had already identified Beheler as a suspect ... [and] the interview was designed to produce incriminating responses." *Id.* at 1123. This Court again summarily reversed, stating that "[a]lthough the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.* at 1125, *quoting Mathiason*, 429 U.S. at 495.

The New Hampshire Supreme Court justified its drastic expansion of "in custody" for *Miranda* purposes by its reading of *Berkemer v. McCarty*, 468 U.S. 420 (1984). *Berkemer* addressed the applicability of *Miranda* warnings to motorists detained for misdemeanor traffic offenses. 468 U.S. at 422-423. In its discussion of what constitutes "custody," this Court stated, "[a] policeman's unarticulated plan [to take the suspect into custody] has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442 (footnote omitted).

It is the second part of the preceding statement that the New Hampshire Supreme Court has misinterperted to drastically expand the meaning of "in custody." Only by viewing the "reasonable man" statement in isolation rather than in the context of the entire *Berkemer* decision can that statement be interpreted to mean a suspect may be "in custody" despite a total lack of objective manifestations of restraint upon the sus-

pect's freedom. *Mathiason*, *Beheler*, and *Berkemer* clearly indicate that custody only arises when the police have restricted a suspect's freedom of movement to a degree associated with a formal arrest.

The New Hampshire Supreme Court thus has created a confusing, almost subjective, test for determining "in custody" for *Miranda* purposes. The decision is directly at odds with *Mathiason*, *Beheler*, and *Berkemer*, and is based entirely upon a misinterpretation of *Berkemer*. Plenary consideration of this case by this Court is essential to correct the New Hampshire Supreme Court's misinterpretation and drastic expansion of this Court's prior decisions and to provide guidance to other state and federal courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE,
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THE STATE OF NEW HAMPSHIRE

v.

ROBERT DAVID DEDRICK

October 6, 1989

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Joanne Green, assistant appellate defender, of Concord, by brief and orally, for the defendant.

JOHNSON, J. The defendant, Robert David Dedrick, has been indicted for first degree murder in the stabbing death of Luis Ramirez. Following his June 1, 1987 arrest on this charge, Dedrick moved to suppress various statements he made to police officers and physical evidence seized from a Manchester apartment pursuant to a search warrant. The Superior Court (*Murphy*, J.) suppressed some of the statements and all of the physical evidence in question after a September 1987 hearing. Following disposition of its further motions for both reconsideration and additional factual findings, the State filed an interlocutory appeal with this Court, and Dedrick filed a cross appeal. The questions before us are whether Dedrick was in custody when he made the relevant statements and, if so, whether those statements, which followed his request for counsel, were the product of interrogation. For the reasons that follow, we affirm and remand.

The parties agree on the following facts, all of which were presented at the September 1987 suppression hearing. Sometime after 3:00 a.m. on May 31, 1987, Sergeant James Stewart of the Manchester Police Department arrived at 560 Chestnut Street to investigate a possible homicide. There he found Luis Ramirez' body in the kitchen of the first floor apartment. The body bore multiple chest wounds. Two witnesses whom Stewart subsequently questioned suggested that Dedrick might have been the last person to see Ramirez alive, and the police attempted to locate him.

On June 1, 1987, at about 9:30 a.m., Dedrick phoned the Manchester police station. He told the dispatcher who answered that he understood the police were looking for him and wanted to know why. When the dispatcher asked Dedrick whether he would come to the station to answer some questions, Dedrick said he had no transportation, but would come if someone picked him up. After Dedrick gave the dispatcher his location and a description of his clothes, Sergeant Stewart and Lieutenant William Bovaird met him, again asked whether he was willing to speak with them and, on his assent, transported him to the station. During the ride, conversation was limited to small talk about money Dedrick owed his landlord.

At the station, Sergeant Stewart and Lieutenant Bovaird accompanied Dedrick through the officers' entrance, up to the second floor, and into an interview room. There they informed him that he was not under arrest and that they would like to speak with him. Sergeant Stewart then obtained a brief background history and questioned Dedrick generally about his activities on the afternoon of May 30, 1987. During this time, Dedrick drank from a bottle of soda he had brought with him and left the room alone to use the men's room.

The interview room measures eight by eight feet and is windowless. It is lit by a single lamp and contains a round table

and three chairs. Throughout the interview, Lieutenant Bovaird sat in front of the door, Dedrick sat opposite him, farthest from the door, and Sergeant Stewart sat between them. The door remained closed.

Dedrick told the officers that on the 30th he had been painting until 4:00 p.m. and had then gone to the apartment of a friend named "Luis". After a short period of time, he had left the apartment and played softball for awhile, before returning around 6:00 p.m. and leaving again around 7:00 p.m. When Dedrick finished relating his activities, the officers left the interview room and closed the door behind them. They then discussed his story and concluded that it contradicted information gathered from other witnesses. Sergeant Stewart testified at the suppression hearing that, while he and Lieutenant Bovaird were in the hallway, they also received information that Dedrick had owed Ramirez money for cocaine and that Ramirez had solicited two co-employees to "get the money back from [Dedrick] . . . at any cost."

The officers then went back into the interview room and told Dedrick that they suspected he had been untruthful. Before asking him further questions, they read him his *Miranda* rights. Dedrick, who had never before been arrested, read and initialed each right on the State's standard waiver form and signed the accompanying waiver. The officers again told Dedrick he was not under arrest, but it was the last time they would do so. They then informed him that Ramirez was dead. According to their testimony, he put his hands to his face, apparently surprised and shaken by this news. This was the first time during their encounter with him that the officers had mentioned to Dedrick that they wanted to question him about Ramirez. Stewart and Bovaird next confronted Dedrick with discrepancies between his earlier responses and those of other witnesses. The officers revealed that they knew Ramirez had dealt cocaine and had hired someone to collect $640 Dedrick owed him. They repeatedly suggested that Dedrick and

Ramirez had argued over this debt and that Dedrick, who was "not a bad kid," had stabbed Ramirez in self-defense. They told him that his fingerprints and sneakers would likely match bloody fingerprints and footprints found in Ramirez' apartment. When Dedrick vehemently denied killing Ramirez, Stewart and Bovaird told him they knew he was lying because they knew "he was in [Ramirez' apartment]" and had worn sneakers on the night of the murder. They also told him they knew he owned a knife.

After forty minutes of heated questioning, Dedrick said he did not know what to do and felt he should speak with a lawyer. Lieutenant Bovaird immediately stood up and left the room. Sergeant Stewart also stood up, gathered his papers from the table, and said "You want a lawyer, that's fine with us, but we'll never know Ramirez came at you with a knife." In response Dedrick suddenly exclaimed, "That's how it happened." He quickly added that Ramirez had indeed come at him with a knife, prompting him to punch Ramirez, take the knife away, and stab him. Dedrick then leaned across the table to show Stewart a cut on his arm.

Sergeant Stewart closed the door and sat back down. Lieutenant Bovaird soon returned as well and, when Stewart said Dedrick had confessed, they asked him to tell his story from the beginning. Dedrick then gave a detailed account of the incident and stated that he had thrown the knife in a trash can and left the clothes he had been wearing in his apartment. When the officers asked him to show them where he had disposed of the knife, Dedrick again requested an attorney. The officers stopped the questioning, helped Dedrick contact counsel, arrested him for murder, and placed him in a holding cell.

Alleging violations of his State and federal constitutional rights, Dedrick moved to suppress all the statements he made to officers Stewart and Bovaird and any evidence seized pursuant to the search warrant that was issued on the basis of

those statements. The superior court found that, although Dedrick was not initially in custody, his "freedom of movement was restrained to a degree associated with a formal arrest," and he was therefore in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), from the time the detectives reentered the room, gave him his rights, and confronted him with his presumed falsehoods:

> "The Court finds and rules that the defendant was not in custody until the point at which the detectives confronted him with his allegedly inconsistent statements, at which time he was appropriately administered *Miranda* warnings. As the defendant was up until that time free to wander the hallways of the police station and go to the bathroom unaccompanied, the setting cannot be said to have been custodial. When confronted with the inconsistencies by the detectives, however, Dedrick certainly would be justified in concluding he was not then free to leave, even though the detectives assured him that he was not under arrest. It is simply ludicrous to suggest that the defendant could have risen from his seat and freely exited the interview room in the middle of an escalating period of interrogation and gone along on his merry way, especially when the detectives had developed a theory which directly implicated him, and it was their intention to question him further at that point about his involvement."

The court further found that the statement Sergeant Stewart made as he prepared to leave the interview room did not constitute interrogation, but that, given Dedrick's request for counsel, the officers' failure to obtain a further waiver of his rights before eliciting a detailed confession was contrary to *Miranda*'s dictates. The court therefore refused to suppress the words "That's how it happened" and the further statement that Ramirez had come at Dedrick with a knife which he had

taken and used to stab Ramirez. However, the court suppressed all subsequent statements and all evidence seized pursuant to the search warrant based on these statements, since it found insufficient evidence to support the warrant in their absence.

On appeal, the State argues that Dedrick was not in custody for purposes of the Federal Constitution at any time preceding his formal arrest and that the superior court erred as a matter of law in finding otherwise. It contends that the court improperly decided the custody question from a subjective rather than an objective viewpoint and that facts presented at the suppression hearing were otherwise insufficient to support a finding of custody. Dedrick replies that the court correctly found custody, but erred in holding that Sergeant Stewart's comment was not interrogation. He challenges the latter ruling on both State and federal constitutional grounds.

Because the State bases its custody arguments solely on the Federal Constitution, and the superior court apparently held for Dedrick on that basis as well, we consider only federal law in addressing the custody issue. Whether a suspect was in custody for *Miranda* purposes is an essentially factual determination, and we will uphold the superior court in this regard unless its decision was contrary to the manifest weight of the evidence or the result of an error of law. *United States v. Beraun-Panez*, 812 F.2d 578, 580 (9th Cir.), *modified*, 830 F.2d 127 (1987); *State v. Portique*, 125 N.H. 338, 343, 480 A.2d 896, 899 (1984). A person is in custody, and therefore entitled to *Miranda* protections during interrogation, where "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)). Absent actual arrest, the trial court must determine the extent to which freedom of movement was curtailed not by discerning the perceptions of the particular suspect, but by considering "how a

reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). Relevant factors include whether questioning took place in familiar surroundings, the number of law enforcement officers present, the degree of physical restraint placed on the suspect, and the duration and character of the interview. *United States v. Masse*, 816 F.2d 805, 809 (1st Cir. 1987). These factors establish custody where they indicate that authorities "'would not have heeded a request to depart or to allow the suspect to do so.'" *Beraun-Panez supra* (quoting *United States v. Hall*, 421 F.2d 540, 545 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970)).

Contrary to the State's argument, the superior court properly based its custody determination on objective rather tha subjective criteria. First, the court correctly stated early in its opinion that "the subjective beliefs of the arresting officers and arrestee [are] not determinative of when an arrest occurs." Moreover, the finding that "Dedrick certainly would be justified in concluding he was not free to leave" reflects consideration of what a reasonable man in Dedrick's position could properly conclude. That it was "ludicrous to suggest" that Dedrick could have left the interview room similarly evaluates the situation from an objective standpoint. Finally, despite ample evidence on the question, the court made no findings at all as to Dedrick's actual subjective perception of his situation. We therefore hold that the court applied the appropriate objective standard.

It is likewise clear to us that the superior court did not conclude that Dedrick was in custody merely because he was a suspect or because he found himself in a coercive environment. *See Oregon v. Mathiason*, *supra* at 495 ("Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.") Rather, the court made specific findings as to the nature of the room in

which Dedrick was questioned, the number and positioning of the officers, and the length and character of the interview. *See United States v. Masse supra* (listing relevant factors). Most significantly, the court specifically found that, on the officers' reentry after discussing his initial statement and discovering his debt to Ramirez, "the intensity of the interview escalated." Now Dedrick was not answering general questions about his background and activities, but was advised of his rights, accused of untruths and confronted with damning information. Furhter, despite his vehement denials, officers Stewart and Bovaird stated time and again that it was Dedrick who had killed Ramirez and that bloody fingerprints and footprints would give them the evidence to prove it. From these facts, the superior court discerned a sea change in the tenor and character of Dedrick's interview. Based on the testimony presented, such a change would have signaled a reasonable man in the same circumstances that the freedom officers had accorded him earlier was no longer available and that, as often as he made denials, they would renew their accusations until, in the end, he either confessed or asked, as Dedrick in fact did, to speak with an attorney.

The facts with which the superior court was presented and on which it based its custody determination are objectively ascertainable and directly relevant in determining custody. Most importantly, they are facts that a reasonable man would likely take to indicate that he was not free to leave. They thus amply support the superior court's custody determination, and that determination can in no way be described as clearly erroneous. We therefore uphold the superior court's conclusion that Dedrick was in custody at all times after officers Stewart and Bovaird returned to the room and read him his rights.

We similarly find no error in the court's determination that Sergeant Stewart's comment to Dedrick as he prepared to leave the room was not interrogation. Because Dedrick has

raised his claim under both State and Federal Constitutions, we would normally address his State claim first. *State v. Ball*, 124 N.H. 226, 231-32, 471 A.2d 347, 350 (1983). However, in this case, Dedrick has failed to enunciate either a State standard different from the federal one or any reason to adopt such a standard, and we therefore address his claim only under the Federal Constitution. *State v. Dellorfano*, 128 N.H. 628, 633, 517 A.2d 1163, 1166 (1986). When a suspect who is in custody for *Miranda* purposes requests an attorney, police must cease all questioning and its functional equivalents. *Rhode Island v. Innis*, 446 U.S 291, 297-301 (1980). When officers utter words that they should know are reasonably likely to elicit a suspect's incriminating response, they engage in the functional equivalent of questioning. *Id.* at 300-02.

Here the superior court set forth the appropriate standard and found that, given Dedrick's vehement denials, Sergeant Stewart could not reasonably have anticipated that his comment would elicit a confession. While we think that the question is a close one and that Sergeant Stewart would have been well advised to withhold his comment, we defer to the superior court's determination since it applied the appropriate legal standard, and its factual finding was sufficient and not contrary to the manifest weight of the evidence. Our task on appeal is to determine whether the superior court applied the proper legal standards and whether there was sufficient evidence to support its decision. We will not overturn the superior court's decision on appeal simply because we might have ruled differently.

In short, because Dedrick was in custody for *Miranda* purposes when he requested an attorney, the officers could not renew questioning without obtaining a further waiver of his rights. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). They did not do so, and the superior court therefore properly excluded the detailed confession Dedrick made in response to

further questioning. The court properly admitted the two statements preceding this confession, since they were not the product of interrogation.

Affirmed and remanded.

BATCHELDER, J., concurred; BROCK, C.J., concurred specially; THAYER, J., with whom SOUTER, J., joined, dissented.

BROCK, C.J., concurring specially: I join in the opinion of my brothers Batchelder and Johnson. They apply the proper standard in reviewing the finding of custody, for we uphold a trial court's finding "unless we condlude that it is clearly erroneous or contrary to the manifest weight of the evidence." *State v. Gosselin*, 131 N.H. 243, 247, 552 A.2d 974, 976 (1988). In my view, the trial court's finding that the defendant "certainly would be justified in concluding that he was not then free to leave," after the detectives returned to the interrogation room, was neither erroneous nor contrary to the manifest weight of the evidence, as detailed in the majority opinion.

Ambiguity apparent in decisions of the United States Supreme Court, however, leaves me less than certain that the standard we have found applicable in determining whether or not the defedant was in custody is the correct one. The trial court and the majority base the finding of custody upon language contained in *Berkemer v. McCarty*, 458 U.S. 420, 442 (1984) ("the only relevant inquiry is how a reasonable man in the suspect's position would have understood his position"), which seems to establish a somewhat different standard than that enunciated elsewhere in that opinion, *id.* at 439 ("safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest'" (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (*per curiam*))), and in previous cases address-

ing the same issue, *see Beheler supra* ("ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest" (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (*per curiam*))); *Mathiason, supra* at 494 ("*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody'") (*per curiam*); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way"). Given these seemingly conflicting directives from the federal bench, I cannot conclude that the trial court here erred as a matter of law.

THAYER, J., dissenting: In ruling that the defendant was in custody from the point when the detectives read him his *Miranda* rights and accused him of being untruthful, the trial court stated that "[w]hen confronted with the inconsistencies [between his statements and the information obtained from other witnesses,]" the defendant could have concluded that he was not free to leave, "even though the detectives assured him that he was not under arrest." The trial court found that at that time, the intensity of the interview "escalated," although "[n]o acts of intimidation or coercion took place," and that the detectives "had developed a theory which directly implicated [the defendant], and it was their intention to question him further at that point about his involvement."

The court held a hearing on the defendant's motion to suppress his statements and the physical evidence seized from 622 Prescott Street. The defendant testified that it was his belief that once the police indicated that they wanted to talk to him, he had no choice but to go to the station and do so. Thus, he testified, he felt his freedom was effectively restricted when Officer Forest asked him over the phone if he would talk to the detectives. He stated that he believed that if

he did not go to the station and answer their questions, the police "probably would have found (him) and arrested (him) and taken (him) down there." He further stated that it was his belief that the police could arrest any citizen who was unwilling to talk to them. The defendant testified that he felt that if he had attempted to leave the station, the detectives would have stopped him. He acknowledged that the police had gone over his *Miranda* rights with him and that he understood those rights. He stated, however, that he believed that he could not exercise those rights. Defendant further stated that, although the police told him that he was not under arrest, he felt that he could not leave. He testified, however, that until the time that the police put him in the holding cell, they did not do anything to suggest to him that he was not free to leave. They had never told him that he was not free to leave, and he had not asked to leave or tried to leave. The officers had not taken out their guns, threatened him in any way, or screamed at him.

Despite the defendant's own testimony that the officers did nothing to suggest that he was not free to leave until they placed him in the holding cell, it appears that the trial court determined that somehow the station house setting, the detectives' informing the defendant of their suspicion (albeit unconfirmed) that fingerprints might exist to prove his involvement in Ramirez' death, the fact that the police had information that Dedrick owed Ramirez money for cocaine and Ramirez had hired two co-employees "to get the money back from [Dedrick] at any cost," and the fact that the interview was designed to produce incriminating responses, rather than any objective manifestation of police restraint upon the defendant's freedom, rendered the situation custodial. Becuase, as I interpret the relevant United States Supreme Court decisions, this is not the appropriate federal constitutional standard to be applied, I would vacate the trial court's order and remand in

order that the trial court may reconsider its finding of custody in accordance with the standard set forth below.

The appropriate inquiry in determining whether an individual is in custody for the purposes of *Miranda v. Arizona* is whether there is a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)). Absent formal arrest, a finding of custody thus requires "at least some objective manifestation" of restraint on the defendant's freedom, *Fisher v. Scafati*, 439 F.2d 307, 310 (1st Cir.), *cert. denied*, 403 U.S. 939 (1971), and any unarticulated plan or intent to arrest the defendant that the officers may develop during interrogation "has no bearing on the question whether [the defendant] was 'in custody'" at that time. *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

The United States Supreme Court's decisions, *Oregon v. Mathiason supra* and *California v. Beheler supra* are particularly instructive here. In *Oregon v. Mathiason*, the defendant, a parolee, was suspected by the police of having been involved in a burglary. The defendant voluntarily came to the police station, where he was interviewed by a police officer in an office with the door closed. The officer informed the defedant that he was not under arrest and told the defendant that he wanted to speak with him regarding a burglary and that the truthfulness of the defendant's statements would possibly be considered by the district attorney or the judge. *Oregon v. Mathiason, supra* at 493. The officer further (falsely) advised the defendant that his fingerprints had been found at the scene. Shortly thereafter, the defendant confessed to the burglary. The officer then informed the defendant of his *Miranda* rights and took a taped confession. The defendant was released approximately thirty minutes after the interview had commenced. *Oregon v. Mathiason, supra* at 493-94.

The Supreme Court of Oregon reversed the defendant's conviction for burglary on the ground that his confession had been obtained in violation of his *Miranda* rights. The Oregon court stated:

> "We hold that the interrogation took place in a 'coercive environment.' The parties were in the offices of the State Police; they were alone behind closed doors; the officer informed the defendant he was a suspect in a theft and the authorities had evidence incriminating him in a crime; and the defendant was a parolee under supervision. We are of the opinion that this evidence is not overcome by the evidence that the defendant came to the office in response to a request and was told he was not under arrest."

State v. Mathiason, 275 Or. 1, 5, 549 P. 2d 673, 675 (1976), *rev'd Oregon v. Mathiason supra.*

The United States Supreme Court summarily reversed, holding that on these facts "there [was] no indication that the questioning took place in a context where [the defendant's] freedom to depart was restricted in any way." *Oregon v. Mathiason*, *supra* at 495. According to the Supreme Court:

> "Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.' Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they

> question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited."

Oregon v. Mathiason supra (emphasis in original). The Supreme Court expressly rejected the Oregon court's finding that the officer's false statement to the defendant about having discovered the defendant's fingerprints at the scene was "another circumstance contributing to the coercive environment" which triggered the applicability of *Miranda*. According to the Supreme Court, "[w]hatever relevance this fact may have to other issues in the case, it has nothing to do with whether [the defendant] was in custody for purposes of the *Miranda* rule." *Oregon v. Mathiason*, *supra* at 495-96.

Similarly, in *California v. Beheler*, the defendant was one whom the police suspected of murder; the defendant voluntarily came to the police station for questioning, where, as in the present case, he was informed that he was not under arrest. After the interview, the defendant was told that his statement would be evaluated and he was then released. He was arrested several days later, and was tried and convicted partially on the basis of his statement.

The California Court of Appeal reversed the defendant's conviction on the ground that the police had failed to comply with *Miranda*. *California v. Beheler*, 463 U.S. at 1122-23. In determining that the defendant was in custody at the time he was questioned, the California court focused on the fact that the interview took place in the station house, the police had already "designed to produce incriminating responses." *Cali-*

fornia v. Beheler, *supra* at 1123. The California court attempted to distinquish *Mathiason* on several grounds including the temporal proximity of the interrogation to the alleged offense and the defendant's state of emotional distress. *California v. Beheler*, *supra* at 1124-25. The State court reasoned that the *Mathiason* decision did not preclude a consideration of the "totality of the circumstances" in determining whether a suspect is in custody. *California v. Beheler*, *supra* at 1125.

The United States Supreme Court again reversed, reiterating its holding in *Mathiason* with the now familiar statement that "[a]lthough the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, *supra* at 1125 (quoting *Oregon v. Mathiason*, 429 U.S. at 495).

These cases clearly indicate that the questioning of one suspected of a crime rises to the level of custodial interrogation only when the police have restricted the individual's freedom of movement to the degree associated with a formal arrest. Thus, although I agree that custody must be determinead by an objective reasonable standard, *see Berkemer v. McCarty*, 468 U.S. at 442, I remain convinced, unlike my brothers Johnson and Batchelder, that under the standard articulated by the Supreme Court, in order for the defendant's perception of custody to be reasonable, it must be based upon some objective manifestation of restraint upon the defendant's freedom; *i.e.*, some words or actions on the part of the police that would objectively signal to the defendant that he is not free to depart. *See Davis v. Allsbrooks*, 778 F.2d 168, 172 (4th Cir. 1985) (although "any encounter with police may be both anxious and unpleasant," such unpleasantness does not necessarily render the situation custodial under *Mathiason* and *Beheler*); *cf.*

United States v. Camacho, 674 F. Supp. 118, 123 (S.D.N.Y. 1987) (restraints rendering the situation custodial included the officers' instructing the defendant to "sit down, remain seated, and make no sudden movements ... for *your safety* and our safety," as well as their monitoring the defendant's every movement including his use of the bathroom (emphasis in original)). Because it does not appear that the trial court based its ruling on such a finding, I would vacate and remand for further consideration by the trial court. Before leaving this issue and although not raised in this case, I must note my concern over the effect the majority's decision will have on fourth amendment issues.

I dissent as well from the majority's holding assuming the defendant is in custody that Sergeant Stewart's comment to the defendant following his request for counsel did not constitute interrogation pursuant to the federal constitutional standard set forth in *Rhode Island v. Innis*, 446 U.S. 291 (1980). The United States Supreme Court has defined interrogation for purposes of *Miranda* to include not only express questioning but also "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. The appropriate focus in determining whether a particular statement constitutes interrogation is primarily on the reasonable perception of the suspect rather than on the intent of the police. *Id.* "[W]here a police practice is designed to elicit an incriminating response from the accused, [however,] it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Id.* at 302 n. 7.

Sergeant Stewart testified at the suppression hearing that in making the statement, which he characterized as a "parting shot," he had "wanted to give [the defendant] something to think about. . . ." Lieutenant Bovaird testified that the police sometimes give such a "parting shot" to a suspect after he

requests an attorney because "possibly [the suspect] would change his mind as far as having something to think about when he leaves the station." Thus, the admitted purpose of the officers' practice of making such a statement was to induce the defendant to "change his mind" and to confess prior to his consulting with an attorney. This uncontroverted evidence belies the trial court's finding that the statement was not intended to elicit an incriminating response. *Cf. United States v. Thierman*, 678 F.2d 1331, 1335 n. 4 (9th Cir. 1982) ("police practices designed to elicit an incriminating response will normally be deemed interrogation").

The ultimate question, however, is whether the statement was one which the officer should have known would be reasonably likely to elicit an incriminating response. The trial court found, and the majority apparently agrees, that the statement did not satisfy this test, because the defendant had previously denied the officers' self-defense theory, and Sergeant Stewart was "sincerely astonished" by the defendant's affirmative response.

I do not consider these facts to be determinative in characterizing the defendant's statement. That Sergeant Stewart was honestly surprised that his "parting shot" was successful in accomplishing its intended purpose of prompting a confession does not preclude a finding that such a result was reasonably foreseeable. The officer's statement must be viewed in the context of the entire circumstances and the reasonable perceptions of the defendant. During the preceding period of interrogation, the detectives had indicated to the defendant that they believed he was the person who had stabbed Ramirez and that their only question was whether he had done it in self-defense. Considering Sergeant Stewart's comment in this context, it was not, as in *Innis*, merely part of a conversation overheard by the defendant relative to a subject matter which the police had no reason to know was of any peculiar significance to him. *Cf. Rhode Island v. Innis*, 446

U.S. at 302 (no evidence that police were aware that defendant was peculiarly susceptible to an appeal relative to handicapped children). Rather, Sergeant Stewart's comment was made directly to the defendant, immediately following a forty-minute period of questioning which had focused primarily upon the self-defense theory. It was a direct challenge to the defendant to answer questions then, without an attorney, or lose his chance to explain that he had acted in self-defense. This practice amounted to more than the "subtle compulsion" which the Supreme Court found insufficient in *Innis*. *See id.* at 303.

This determination finds further support in the Supreme Court's explanation of the parameters of custodial interrogation in the *Innis* decision. Referring to the *Miranda* opinion itself for guidance in defining interrogation, the *Innis* Court observed that "[t]he Court in *Miranda* also included in its survey of interrogation practices the use of psychological ploys, such as to 'posi[t]' 'the guilt of the subject,' to 'minimize the moral seriousness of the offense,' and 'to cast blame on the victim or on society.' . . . It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation." *Rhode Island v. Innis*, *supra* at 299 (quoting *Miranda v. Arizona*, 384 U.S. at 450). Here, Sergeant Stewart's "parting shot" to the defendant in essence posited that the defendant had merely stabbed Ramirez in self-defense, and that if he exercised his right to consult with an attorney, then the police would "never know" the mitigating circumstances of the incident. This was precisely the type of "psychological ploy" that "no less than express questioning," the Supreme Court recognized as interrogation, which, in a custodial setting, implicates the procedural protections of *Miranda*.

Moreover, the Supreme Court has consistently recognized the value of a prophylactic "bright-line" prohibition of police-initiated questioning after the defendant has invoked his right

to counsel. *See, e.g., Smith v. Illinois*, 469 U.S. 91, 98 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983); *Edwards v. Arizona*, 451 U.S. 477, 486 n. 9 (1981) (following a request for counsel, the accused and not the police must reopen dialogue with the authorities). Absent such a rule, the police "through 'badger[ing]' or 'overreaching' — explicit or subtle, deliberate or unintentional — might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith v. Illinois supra* (quoting *Oregon v. Bradshaw supra*).

For all of these reasons, I respectfully dissent. I would hold, therefore, that were the trial court upon remand to find the defendant in custody, the court must suppress the defendant's response to Sergeant Stewart's comment as the product of impermissible custodial interrogation.

SOUTER, J., joins in the dissent of THAYER, J.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT

87-S-1402

The State of New Hampshire

v.

Robert D. Dedrick

SUPPLEMENTAL ORDER ON DEFENDANT'S MOTION TO SUPPRESS

The matters before the Court addressed by this supplemental order are threefold: 1.) the admissibility of certain inculpatory statements made by the defendant subsequent to Officer Stewart's "parting Shot"; 2.) expansion of the "good faith exception" to the warrant requirement under *U.S. v. Leon*E, 468 U.S. 1250 (1984) to situations in which motions to suppress successfully challenge not the magistrate's conclusion that the affidavit demonstrated probable cause, but the officer's conduct upon which the probable cause was based was itself unlawful; and 3.) bail. A hearing was held on November 24, 1987.

1.)

This Court finds and rules upon review of the transcript of the evidentiary hearing on the Motion to Suppress that the defendant's admissible statement, "that's how it happened" is expanded to include the following admissible statement, "he

stated that Mr. Ramirez had come at him with a knife, that he had punched the subject, took the knife away and stabbed him." (T. at p. 41, 111).

The Court further finds and rules, however, that after Detective Bovaird reentered the interview room (T. 44, 132) the defendant's further elaboration at the behest of the detectives, which included statements regarding the whereabouts of a knife and a T-shirt in a public trash can and of other clothing and shoes worn by the defendant to be at 622 Prescott Street (T. 112, 133), was in response to interrogation, not merely follow-up questioning and accordingly violated the defendant's right to counsel and silence and is therefore not admissible at trial.

2.)

In *U.S. v. Leon*, 468 U.S 1250 (1984) the Supreme Court enunciated a limited exception to the exclusionary rule under the Fourth Amendment of the Federal Constitution, made applicable to state action through the Fourteenth Amendment. The New Hampshire Supreme Court has not heretofore adopted *Leon*.

The Court in *Leon* held that evidence obtained by officers acting in reasonable good faith reliance on a facially valid search warrant issued by a neutral and detached magistrate, but ultimately found to be invalid, should not be barred from use in the prosecutor's case in chief.

In a case in which the officer's conduct is objectively reasonable,

> ". . . excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act

> in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty . . . ."

Leon, 468 U.S. at 920, *quoting*, *Stone v. Powell*, 428 U.S. 465, 540-541.

Thus, when an officer acting with objective good faith has obtained a search warrant from a judge or a magistrate, and the officer acts within its scope, there is no police illegality and thus nothing to deter. *Leon*, 468 U.S. at 920.

The objective standard, moreover, requires officers to have a reasonable knowledge of what the law prohibits. *U.S. v. Peltier*, 422 U.S. 531 (1975). Therefore, in the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. *Leon*, 468 U.S. at 926.

To expand the good faith exception to the warrant requirement to situations in which the officers conduct upon which probable cause was based was itself unlawful would effectively eviscerate the basic underpinnings of the good faith exception.

The premise of the good faith exception is that in the absence of any police illegality suppression of evidence is an inappropriate remedy because it does not serve to deter future police misconduct.

The Court finds and rules that expansion of *Leon* is not warranted in this case nor supported logically within the parameters of the purpose of the exclusionary rule.

Furthermore, assuming *arguendo*, the Court were to apply the good faith exception in this case, the Court finds and rules

that suppression would be appropriate because the officers, at the very least, were reckless in their preparation of the affidavit. Officers are required to have a reasonable knowledge of what the law prohibits; thus, the officers could not have harbored an objectively reasonable belief in the existence of probable cause as the basis for establishing probable cause to support the issuance of the search warrant was a confession obtained in violation of the defendant's right to counsel and the defendant's right to remain silent.

3.)

Ruling on the issue of bail is deferred for twenty (20) days to give the State the opportunity to advise the Court of its intention whether or not to proceed to trial or file a request for expedited interlocutory appeal.

Nov. 25, 1987

Date

Walter L. Murphy,
Presiding Justice

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH, SS. SEPTEMBER TERM, 1987

87-S-1402

The State of New Hampshire

v.

Robert D. Dedrick

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

The defendant Robert D. Dedrick stands indicted of first degree murder in the death of Luis F. Ramirez alleged to have been committed on May 30, 1987. The defendant seeks to suppress inculpatory statements given by him to Manchester Police Department detectives on June 1, 1987, as well as all evidence seized pursuant to a search warrant issued by the Manchester District Court permitting the search of the defendant's abode at 622 Prescott Street in Manchester on the grounds that the basis for the issuance of the warrant were the inculpatory statements sought to be suppressed.

The Court held an evidentiary hearing on the Motion on September 15, 1987, at which several witnesses testified. The Court also took a view of the police station at which the statement was obtained. From this evidence, the Court makes the following findings of fact:

On May 31, 1987, Detective James Stewart, together with Captain Broder of the Manchester Police Department responded to 560 Chestnut Street in Manchester in response to

a call about a possible homicide committed at that address. Upon their arrival, the officers found a body, later identified to be that of Luis Ramirez, with multiple chest wounds. A neighbor informed the officers that between 7:00 p.m. and 8:00 p.m. the previous evening she was awakened by a loud noise, music and a shaking floor. She knocked on the door of the victim's apartment, and while she received no response, she heard a sigh emanate from the room, as a result of which she concluded that someone was in the apartment.

Subsequently, the officers' investigation uncovered two witnesses, one of whom stated that she had seen the victim on May 30, 1987 accompanied by a white male wearing a white painter's cap. The other witness, identifying himself to be the landlord at 560 Chestnut Street, stated that on that same date between 7:00 p.m. and 7:15 p.m. he saw the victim with "David Dedrick," whom he described as a white male wearing shorts, sneakers and a white painter's cap. He recognized the defendant by reason of the fact that he had had previous contact with him as a tenant in another apartment. Because those witnesses' statements led them to believe that Dedrick might have been the last person to see Mr. Ramirez alive, they actively began to seek his whereabouts.

On the morning of June 1, 1987, at about 9:00 a.m., Detectives Stewart and Bovaird went to 622 Prescott Street on information that the defendant was living there. They were greeted at the door by "Bernie" Knapp (Herbert Knapp), who denied knowing the defendant, told the officers that the defendant did not live there and that he did not know where he could be located. In fact, however, the defendant was present in a room in the rear of that apartment. Upon being assured by Knapp that Dedrick was not there and did not reside there, the officers departed and continued their search for him.

At about 9:30 a.m. on the same day, the dispatcher at the Manchester Police Station received a phone call from a person

identifying himself as "Dave Dedrick," who indicated that he understood that the police were looking for him and questioned what it was all about. The dispatcher asked Dedrick if he would mind coming to the police station to answer some questions because detectives wanted to talk to him. Dedrick responded that he had no transportation but would be willing to come to the station if someone would pick him up. The dispatcher obtained Dedrick's location and radioed a cruiser to pick him up. Upon overhearing the dispatcher on the police radio, Detectives Stewart and Bovaird informed the dispatcher that they would pick up Dedrick. The officers arrived at a laundromat at the corner of Prescott and Wilson Streets in Manchester, where Dedrick had said he would be. As a matter of fact, when they arrived Dedrick was still on the telephone to the dispatcher. Officer Bovaird remained in the unmarked cruiser while Detective Stewart exited the vehicle. He saw two individuals, one of whom he recognized as Bernie Knapp, and the other who came out of the building and identified himself as David Dedrick. On the sidewalk, Detective Stewart asked the defendant if he would mind coming to the police station, to which he responded, "No." Dedrick was neither handcuffed nor frisked, and Dedrick entered the back seat of the cruiser by opening the door himself. Stewart sat in the front passenger seat. There was no grill separating the front and rear seats, nor were the rear doors locked.

During the five to ten-minute transport to the police station, little conversation took place except that Dedrick asked if this was about some money he owed to his landlord, to which Detective Stewart responded, "We don't get involved in civil cases." Dedrick never did inquire what it was all about.

Upon arrival at the police station, Dedrick was accompanied by the officers through the officers' entrance at the rear of the station. Entrance is gained by the use of an electronic code. They then took an elevator to get to the second floor to the Detective Division Office. While defendant was there, all exits

remained unlocked and were well-marked. In the Detective Division Office, the two detectives brought Mr. Dedrick to an interview room where Detective Stewart obtained a brief background history from the defendant. While in the room, the defendant was drinking from a bottle of soda, which he had brought with him, and on one occasion left the room alone to use the men's room, which was outside the Detective Division Office in a hallway which led to no less than three well-marked exits. The interview room itself is approximately eight feet by eight feet, has a round table in the middle of it and three chairs. After using the men's room, the defendant returned to the detective's office on his own and continued to drink the soda in the interview room with both detectives present. The interior of the room is windowless and lit by a single lamp. Detective Bovaird sat in front of the closed, unlocked, access door to the interview room while the defendant sat opposite, farthest away from the door. Detective Stewart sat in the other chair, between the defendant and Detective Bovaird. The defendant was told that he was not under arrest but that they would like to question him.

The officers then questioned the defendant about his activities on the afternoon of May 30, 1987. Defendant stated that he had painted with Bernie Knapp and afterwards went to a restaurant. He acknowledged that he went to Ramirez's apartment around 4:30 p.m., where he watched a dirty movie with Ramirez and a number of Ramirez's relatives. He also said he left the apartment, got himself involved in a pick-up ballgame at a nearby park and returned later to Ramirez's apartment about 6:00 p.m., leaving around 7:00 p.m. He also stated that he had run into his former landlord at this time.

At this point of the interview, about 10:00 a.m., both detectives left the interview room, closing the door behind them, leaving Dedrick alone inside. They discussed what Dedrick had told them and concluded that his statements were inconsistent with information previously obtained from other wit-

nesses. They then went back into the interview room, and Dedrick was told of their suspicions that his statements were not truthful. The detectives then read the defendant his *Miranda* rights. Dedrick read, signed and initialed each right on the form (State's Exhibit Number 1) and signed the waiver. The detectives again assured him he was not under arrest and disclosed for the first time that Ramirez was dead. In apparent astonishment, Dedrick put his hands to his face, and at this point the intensity of the interview escalated. After further questioning, the defendant admitted being in debt to Ramirez for cocaine. The suggestion by the detectives that he had possibly acted in self-defense was vehemently denied. No acts of intimidation or coercion took place. At about 10:40 a.m., after a lengthy discussion about cocaine and his connections with Ramirez, defendant requested to speak with an attorney. Upon that request, Detective Bovaird exited the interview room. Detective Stewart gathered together his notes, stood up, and made the following remark, which, during the course of the hearing, he characterized as a "parting shot":

> "You want a lawyer? That's fine with us. We'll never know Ramirez came at you with a knife."

In light of Dedrick's previous, vehement denials regarding suggestions of self-defense, Office Stewart expressed amazement at the defendant's immediate response: "That's how it happened."

Detective Stewart then left the interview room, told Detective Bovaird what had just been said, and both detectives reentered the room, at which time the defendant gave a full, detailed description of the event, explaining that Ramirez came at him with a knife, and in the act of self-defense the defendant stabbed Ramirez. He further told the officers that the clothes that he had been wearing, including blood-stained sneakers, were at 622 Prescott Street and that he threw the knife, wrapped in his T-shirt, in a public trash can on Elm

Street. When asked by the officers to identify which public trash can, Dedrick stated that he wanted first to talk to a lawyer. At that time, the detectives discontinued the questioning, and the defendant was formally arrested and placed in a locked holding cell after he had the opportunity to communicate with his lawyer.

Defendant's first contention is that he was illegally seized (i.e., seized without the requisite probable cause) when he was taken to the police station in the detectives' unmarked cruiser.

An individual is seized for purposes of both the New Hampshire Constitution, Part I, Article 19 and the Fourth Amendment of the Federal Constitution, "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *State v. Riley*, 126 N.H. 257, 262 (1985), quoting *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980).

Under this analysis, the subjective beliefs of the arresting officers and arrestee is not determinative of when an arrest occurs. However, contained in the analysis is a determination of whether there has been a "show of authority" such that the liberty of the individual has been restrained. *Riley*, Id. at p. 262.

Circumstances indicating a "show of authority" include, but are not limited to, "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Riley*, Id. at p. 262.

In light of the foregoing analysis, the Court concludes that Dedrick was not seized when he entered the unmarked cruiser, simply because, at his own election he initiated contact with the police, voluntarily agreed to accompany the de-

tectives to the police station, and was informed that he was not under arrest. Plainly, none of the above-described circumstances indicating a "show of authority" were present at the moment Dedrick entered the cruiser. A reasonable person would have believed that he was free to leave, notwithstanding defendant's assertions that he was under the impression that he had no choice in the matter.

The defendant's next contention is that the police did not scrupulously honor his rights to silence and counsel. The Court must determine whether at the time the defendant asserted his desire to remain silent and speak with counsel he was entitled to these safeguards under *Miranda v. Arizona*, 451 U.S. 477 (1981). The *Miranda* safeguards apply only to situations involving a custodial interrogation. *Miranda* at p. 467-8; *State v. Portigue*, 125 N.H. 338 (1984).

Thus, the Court must first consider whether the defendant was in fact in custody. This Court has already addressed that issue with respect to seizure addressed above. However, the fact that the defendant was not originally seized does not dictate a finding that throughout his interrogation he was not placed in custody. The threshold for determining whether an interview is tantamount to custodial interrogation is whether there is a "formal arrest or restraint on freedom of movement of a degree associated with a formal arrest." *State v. Portigue* at 344. Citing *California v. Beheler*, 1035 S.Ct. 3517, 3519-20 (1983); *Berkemer v. McCarty*, 468 U.S. 420 (1984). The Court finds and rules that the defendant was not in custody until the point at which the detectives confronted him with his allegedly inconsistent statements, at which time he was appropriately administered the *Miranda* warnings. As the defendant was up until that time free to wander the hallways of the police station and go to the bathroom unaccompanied, the setting cannot be said to have been custodial. When confronted with the inconsistencies by the detectives, however, Dedrick certainly would be justified in concluding he was not then free

to leave, even though the detectives assured him that he was not under arrest. It is simply ludicrous to suggest that the defendant could have risen from his seat and freely exited the interview room in the middle of an escalating period of interrogation and gone along on his merry way, especially when the detectives had developed a theory which directly implicated him, and it was their intention to question him further at that point about his involvement. Thus, the defendant's "freedom of movement was restrained to a degree associated with a formal arrest" at that time.

Because prior to that time the defendant was not in custody, as found by this Court, there was no need for the detectives to advise the defendant of his rights under *Miranda*.

Another issue raised by the defendant is whether or not the statements made by him during the course of the interrogation by the detectives were in fact voluntary. He raises that issue under both the United States and New Hampshire Constitutions, as a result of which, because the New Hampshire Constitution affords greater protection than the Federal, this Court is bound by the State Constitution provisions under Part I, Article 15. *State v. Ball*, 124 N.H. 226 (1983). Thus, the State bears the burden of proving beyond a reasonable doubt that the defendant's statements were voluntary. *State v. Phinney*, 117 N.H. 145, 147 (1977); *State v. Benoit*, 126 N.H. 6, 14 (1985).

To be voluntary, a statement must be the product of an essentially free and unconstrained choice. The decision to confess must be freely self-determined, the product of a rational intellect and a free will. The defendant's will to resist must not be overborne, nor can his capacity for self-determination be critically impaired. The determination of voluntariness must be reached in the light of the totality of all the surrounding circumstances, taking into consideration both the characteris-

tics of the accused and the details of the interrogation. *State v. Reynolds*, 124 N.H. 428, 434 (1984). (Citations omitted.)

On the evidence adduced in this case, it is found and ruled that the defendant validly waived his *Miranda* rights up until the time he invoked his right to counsel and silence. This finding is made beyond a reasonable doubt, as required by the New Hampshire Constitution.

After the detectives advised the defendant of his rights and read them to him under *Miranda*, the defendant also read, signed and initialed each right on the Acknowledgment and Waiver of Rights form. (State's Exhibit Number 1). Further, defendant testified, and the Court so finds, that he has no reading difficulties and fully understood the meaning of his rights at the time they were read to him and exercised a valid waiver of them freely, voluntarily and intelligently. It is found that the defendant made a rational choice based upon appreciation of the consequences. *State v. Gullick*, 118 N.H. 915 (1978).

Even in light of a valid waiver, which is found in this case, however, the defendant still has the opportunity at any time during interrogation to assert his right to counsel and his right to remain silent. Once he asserts that right, all questioning must cease. *State v. Sheila Portigue*, cited above; *Edwards v. Arizona*, 451 U.S 477, 484 (1981). Otherwise, responses to further interrogatories made after the defendant's assertion of these rights are inadmissible. *Michigan v. Mosley*, 423 U.S. 96, 104-5 (1975).

The Court finds and rules that the defendant, after a 40-minute interrogation subsequent to the detectives re-entering the room, asserted his right to counsel and his right to remain silent when he said, "I better talk to a lawyer."

The issue presented by the detectives' actions thereafter is whether they in effect continued to interrogate.

The Court's finding is that Detective Bovaird left the room because it was his intention to terminate all questioning at that time. It is also found that that was likewise Detective Stewart's intention, but before he left the room he did make the remark: "You want a lawyer? That's find with us. We'll never know Ramirez came at you with a knife."

The precise issue presented by this statement is whether Detective Stewart should have known that such a remark would elicit a response. If so, that comment would be construed as interrogation proscribed by *State v. Dellorfano*, 128 N.H. 628 (1986), quoting *Rhote Island v. Innis*, 446 U.S. 291 (1980).

On defendant's claim of right to counsel after *Miranda* warning, the police had the obligation to cease all questioning or its functional equivalent. The functional equivalent of questioning is when words or actions of the police are such that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v. Innis*, cited above.

The Court finds and rules that the comment made by Detective Stewart was not made either with an intention to elicit a response, nor can he be said to have believed that the words used were reasonably likely to elicit an affirmative response by the defendant, particularly in light of the defendant's previous vehement denials of having anything to do with the death of Ramirez. The Court further finds and rules that Detective Stewart was sincerely astonished at defendant's response. Accordingly, the statement made by the defendant: "That's how it happened." is admissible.

Statements made to the police thereafter, however, are not admissible. When Detective Stewart left the room and told Detective Bovaird what the defendant had said, both detectives re-entered the room to resume questioning, notwithstanding the fact that the defendant had asserted his right to counsel in the meantime. The fact that he made an incriminating statement after he asserted his right to counsel does not necessitate a finding by the Court that he waived his rights. *State v. Gullick*, cited above. Since he asserted his right to counsel and his right to remain silent, his assertion must be given heed by the police. The detectives at the point that they re-entered the room at that time had the obligation to obtain a waiver from the defendant prior to resuming any questioning. Having failed to do so, any statments made by the defendant thereafter are inadmissible, and it is so found and ruled. The type of conversation which ensued upon the detectives' re-entering of the room is unlike that described in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), and, thus, that case and its finding are inapplicable. See *Smith v. Illinois*, 469 U.S. 91 (1984).

The defendant's statements made after his assertion of right to counsel and after his spontaneous remark made to Detective Stewart described herein form the basis for the application of the search warrant and the affidavit in support thereof and information contained therein independent of those statements would be insufficient to justify the issuance of a warrant, the result of the search conducted by the authorities pursuant to the warrant are likewise inadmissible. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Commonwealth v. White*, 374 Mass. 132, 371 N.E.2d 777 (1977), affirmed by an equally divided court sub. nom. *Massachusetts v. White*, 439 U.S 290 (1978), re-hearing denied, 439 U.S. 1136 (1979). (Upholding State decision that statement in violation of *Miranda* may not be used to establish probable cause for issuance of search warrant.); *State v. Tapply*, 124 N.H. 318, 327 (1983).

To excise those portions of the statements made in support of the issuance of the search warrant which are tainted by the failure of the detectives to protect defendant's rights under *Miranda* have the effect of emasculating the probable cause necessary to support the issuance of a warrant. Absent such information, the warrant simply could not stand.

Accordingly, the Court finds and rules that all statements made by the defendat up to and including his statement, "That's how it happened." are admissible. All statements made subsequent to that time are inadmissible. The results of the search warrant are likewise suppressed.

The defendant's motion is, with respect to the statements made, thus GRANTED IN PART and DENIED IN PART; with respect to the items seized pursuant to the search warrant, it is GRANTED.

SO ORDERED.

Date: October 21, 1987

Walter L. Murphy,
Presiding Justice